
BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.

FILED

JAN 25 1941

CHARLES ELMORE PROPLEY

FOR & BY

IN THE
Supreme Court of the United States
October Term, 1940
No. 666

DETROLA RADIO & TELEVISION CORPORATION,
Petitioner,

vs.

HAZELTINE CORPORATION,
Respondent.

**REPLY BRIEF FOR PETITIONER IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI.**

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

FLOYD H. CREWS,
HENRY P. ROSIN,
Of Counsel.

BLANK PAGE

IN THE
Supreme Court of the United States

October Term, 1940

No. 666

DETROLA RADIO & TELEVISION CORPORATION,
Petitioner,

vs.

HAZELTINE CORPORATION,
Respondent.

**REPLY BRIEF FOR PETITIONER IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI.**

I.

Respondent seeks to induce a denial of certiorari in this case—which squarely presents a direct conflict between the Circuit Courts of Appeals for the Second and Sixth Circuits—on the unusual assertion that no such conflict exists. The assertion is unusual because one would not expect it to be made to this Court when it is so readily and completely contradicted by a mere reading of the opinions of the two Courts of Appeals. Indeed, it is twice *expressly* contradicted by the decision of the Sixth Circuit Court of Appeals, a review of which is here sought. Thus, in the first instance, that Court said (Vol. III, 1472):

“However, it (the Court of Appeals for the Second Circuit) agreed with the District Court that *the patent disclosed no patentable invention.*”*

* Matter in parenthesis, and emphasis in quotations, are ours throughout this brief.

In the second instance, that Court, referring to the reissue question (here presented as the second ground for allowance of the writ) stated (Vol. III, 1472) :

"Appellant urges that a patent held to be invalid because it discloses no invention, *as is the case here*, cannot be cured by reissue."

A mere reading of the opinion of the Second Circuit Court of Appeals (79 Fed. (2d) 329) inevitably establishes the matter as an indisputable fact. At the very outset of its opinion the Court stated, in substance, that it was not bothered by the propriety of reading limitations into the patent claims "*if there were a genuine invention to be saved in that way*" (p. 330); and that even if the claims were limitedly construed as plaintiff insisted they should be (and here insists they are) "*we think that there was no invention*" (p. 330).

Again, the Second Circuit Court stated (p. 330) with respect to prior art which, it was conceded in the Court below, was directed to effect automatic amplification control (the asserted invention of the Wheeler patent, see the opinion of the Court below, Vol. III, p. 1478, first paragraph):

"At any rate both in principle and means the invention (of the prior art) anticipated Wheeler; it automatically controlled the amplification of a received signal by feeding the voltage of the rectified current from the plate so as to bias the grid of an amplifier; this through a direct connection between the two."
 • • • "The problem of the automatic control of amplification to correspond with variations in amplitude of the carrier current had been solved, and the basic means was known; Wheeler used that means."

The Court then commented with respect to the prior art:

"None of these patents being complete anticipations, the question is as to the importance of the step from them to Wheeler."

Then with respect to the "step" taken by Wheeler, the Court stated:

"* * * the art did not have to wait long for the change. Nor does it seem to us that when it came it involved invention."

concluding with the statement (p. 331):

"Thus we can find no evidence that the steps he (Wheeler) took, given the idea of transferring Affel (a prior art patent) to a receiving set, demanded more than competent designing."

The Court concluded its opinion on the patent (at p. 332) with the sentence:

"We put this patent down as one of those step-by-step advances, not beyond the compass of capable investigators who run down every lead, and cull out those which appear advantageous."

From the foregoing it will be seen that the Second Circuit Court of Appeals indisputably based its decision on the conclusion that the Wheeler patent did not disclose a patentable invention, regardless of how it was claimed; and that the Court of Appeals for the Sixth Circuit *twice* in its opinion expressly so stated. In view thereof, respondent's attempt to induce a refusal of certiorari by an effort to conceal or becloud that simple fact illustrates the extremes to which respondent is prepared to go to avoid the consequences of a review by this Court of a decision which respondent realizes cannot be here justified.

4

II.

We also point out that the direct conflict between the Second and Sixth Circuit Courts of Appeals was complete, down to the most refined details of the case. Thus, the Sixth Circuit Court of Appeals found the Affel and Heising patents of the prior art to be insufficient to invalidate everything disclosed by the Wheeler patent (Vol. III, p. 1480); whereas the Second Circuit Court of Appeals found them sufficient for that purpose (79 Fed. (2d) 329). The Sixth Circuit Court found that the use of the diode of the prior Heising patent was for a purpose "entirely distinct" from that of Wheeler, and not for the purpose of securing "automatic control" (Vol. III, p. 1480); whereas the Second Circuit Court of Appeals held squarely to the contrary (at p. 331). The Sixth Circuit Court concluded that the use of an automatic amplification control circuit in a *transmitter* was patentably distinguishable from the use of the same circuit in a receiver even though its function was identical in both instances (Vol. III, p. 1480);* whereas the Second Circuit Court of Appeals found squarely to the contrary (at p. 331). This direct conflict between the two courts was carried down to even the subject of alleged "commercial success", the Sixth Circuit Court being impressed and much influenced thereby (Vol. III, p. 1471); whereas the Second Circuit Court of Appeals quite aptly pointed out the reasons why that plea was of no avail to respondent (p. 331).

It is self-evident, therefore, that it is practically impossible for there to exist a more complete and direct conflict of opinion on the same subject matter than exists between the Second and Sixth Circuit Courts of Appeals in the present case.

* Note that claims 2, 3 and 5 of the reissue patent in suit are directed merely to "a signalling system" so as to include both a transmitter and a receiver (Vol. III, pp. 872, 873).

Conclusion.

It is believed that with the foregoing exposure of the want of factual support for respondent's attempt to conceal or becloud the direct conflict between the Second and Sixth Courts of Appeals, this Court will conclude that a writ of certiorari should issue for the reasons advanced in the petition therefor; and the allowance thereof is earnestly prayed for.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

FLOYD H. CREWS,
HENRY P. ROSIN,
Of Counsel.

Dated: New York, New York,
January 24, 1941.